tice, the convictions in this case should be brought to the notice of the relevant authorities.

Appeal dismissed.

Solicitors: *Teo & Co.*

KUCHING MUNICIPAL COUNCIL v. CHONG NYUK LAN

[A. Cr. J. (Tan Chiaw Thong J.) September 21, 1981]
[Kuching – Criminal Appeal No. KG 6 of 1980]

Criminal Law & Procedure – Nuisance Order – Refusal of lower court to hold enquiry – Kuching Municipal Ordinance, s. 104(12).

This was an appeal by the appellants against the refusal of the lower court to hold an enquiry under section 104(12) of the Kuching Municipal Ordinance pursuant to an undated Nuisance Order by another magistrate of the same court.

The appellants had in fact applied by way of a letter written by the advocates for the appellants to the magistrate of the District Court, Kuching, attaching thereto a copy of an Order issued by the Secretary of Kuching Municipal Council requiring the respondent to abate nuisance as set out in the order. The respondent failed to comply with the order whereupon an application was made to the lower court for the issue of a Nuisance Order under section 104(4). This Nuisance Order was duly issued by the then Magistrate of the District Council but it was undated.

The lower court appeared to have taken the view that before a Nuisance Order was issued against the respondent, an application should have been made by the appellants by way of a complaint supported by affidavits, whereupon the lower court may issue a notice to the respondent to show cause against the issue of the Nuisance Order applied for.

Held: (1) in the court's opinion, because of the separate stipulations relating to public nuisances contained in the Criminal Procedure Code and the procedural provisions governing such nuisances therein, they cannot be made to apply to nuisances specified in section 104(1) of the Kuching Municipal Ordinance;

(2) in proceedings brought under section 104(12) of the Kuching Municipal Ordinance, a charge should be framed against person proceeded against thereunder charging him with the offence prescribed therein and if he satisfies the court that he had used all due diligence to carry out the requirements of the Nuisance Order he should be acquitted of the offence charged; otherwise he should be found guilty of the offence of having failed to comply with the provisions of the relevant nuisance order with respect to the abatement of the nuisance concerned;

(3) in this case, a criminal summons referring to a charge, was issued and served upon the respondent, but no copy of such charge could be found in the record of proceedings of the lower court. Solely on this ground, the appeal was misconceived and the proceedings before the lower court were also legally wrong;

(4) by making an application under section 104(4) of the Kuching Municipal Ordinance the applicant was in effect applying to the court for the exercise of a discretionary power to make a summary order. Such an application should be given a certain decree of formality and application by letter hardly fulfilled this criteria.

Case referred to:-
(1) *Dowson* v. *McGrath* (1956) 58 W.A.L.R. 27

CRIMINAL APPEAL.

K. C. I. Reddy for the appellants.
Lo Ming for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Appellants against what purports to be a refusal of the lower court to hold an inquiry under section 104(12) of the Kuching Municipal Ordinance pursuant to an undated Nuisance order by another Magistrate of the same court.

The brief facts are as follows. On May 14, 1980, the Appellants made an application to the District Court, Kuching under section 104(4) of the Kuching Municipal Ordinance for the issue of a Nuisance Order against the Respondent. The application was by the way of a letter written by the Advocates for the Appellants to the Magistrate of the District Court, Kuching, attaching thereto a copy of an Order issued by the Secretary of Kuching Municipal Council under the proviso to section 104(3) of the Kuching Municipal Ordinance, requiring the Respondent as registered proprietress of the shop house described as Lot 63, section 23 and known as No. 13 Market Street, Kuching to abate the nuisance as set out in the said Order. The Respondent failed to comply with the requirement in the said Order within a period of two weeks as specified in the Order whereupon the application as earlier mentioned was made to the lower court for the issuance of a Nuisance Order under section 104(4). This Nuisance Order was duly issued by the then Magistrate of the District Court but it was undated. It ordered the Respondent to comply with the requirements of the Order made by the Municipal Secretary within a period of ten days. The validity of the Nuisance Order was not made an issue in the lower court or in this Appeal, although it was undated. From the record of proceedings in the lower court it would appear that on June 26, 1980 a criminal summons was issued against the Respondent summoning her to appear at the District Court on July 8, 1980 "to answer the charge of (See the attached charge sheet)". No copy of the charge referred to appears in the record of proceedings of the lower court and I have not been able to obtain any elucidation on this matter from learned counsel from both parties. The lower court's record further shows that this criminal

summons was served on the Respondent on July 2, 1980 and the first appearance made by the Respondent in the lower court was on July 8, 1980. Since then there were a number of adjournments until October 15, 1980 when the proceedings the subject matter of this appeal took place before the lower court. The lower court appeared to have taken the view that, before a Nuisance Order was issued against the Respondent, an application should have been made by the Appellants by way of a complaint supported by affidavits, whereupon the lower court may issue a notice to the Nuisance Order applied for. It was contended by learned counsel for the Appellants that under the provisions of section 104(12) of the Kuching Municipal Ordinance an inquiry should have been held by the lower court to determine whether the Respondent had satisfied the court that she had used all due diligence to carry out the requirements of the Nuisance Order already mentioned. In my view the first question to consider is what was the nature of the proceedings before the lower court. Learned counsel for the Appellants contended that these proceedings were in the nature of civil proceedings in that the lower court under section 104 (12) should first call upon the respondent to satisfy the court that she had used all due diligence to carry out the requirements of the Nuisance Order and if she succeeds in doing so, she would not be considered to be an accused person; otherwise she would be so considered and a charge would then be framed against her under the said subsection charging her with the offence of having failed to comply with the provisions of the Nuisance Order, as provided in the said subsection. Learned counsel for the Appellants has quoted certain provisions of the Criminal Procedure Code in particular sections 89 to 94 thereof in support of his contention. With respect, I disagree that sections 89-94 of the Criminal Procedure Code which appear under the heading "Public Nuisances" in Chapter 9 of the Criminal Procedure Code are applicable here. Section 89 *inter alia* sets out certain matters which are considered to be either an obstruction or nuisance and it empowers a magistrate of the 1st Class in accordance with the provisions therein to make a conditional order requiring the person complained against to either remove such obstruction or nuisance; or to appear before such magistrate at a time and place to be fixed by the order and move to have the order set aside or modified in manner thereinafter provided. Paragraph 2 of the said section stipulates that no order duly made by a magistrate under the said section shall be called in question in any court except by way of appeal. It is clear that under that section a magistrate of 1st Class magistrate has a discretion to take one of the two courses of action as provided therein. Section 91 enacts that the person against whom a conditional order is made shall (a) perform within the time specified in the order the act directed thereby; or (b) appear in accordance with such order and show cause against the same. The consequences of non-performance or whether the "showing cause" is accepted or not are set out in sections 92 and 93. In the case of non-performance or if the magistrate is not satisfied that the conditional order is not reasonable and proper then the conditional order would be made absolute. Section 94 sets out certain procedural steps to be taken following the conditional order being made absolute under section 92 or 93.

Learned counsel for the Appellants had also referred to certain commentaries under section 133 of the Code of Criminal Procedure in *Mitra's* Code of Criminal Procedure (14th Edition) where at page 309, under the heading "Nature of proceedings" appears the following passage:-

> "Proceedings under this section are more of the nature of civil than of criminal proceedings, and the person against whom proceedings are taken under this section is not an 'accused' person within the meaning of section 342. . . . . "

It is true that no procedural provisions are set out in the Kuching Municipal Ordinance regarding the making of an application for a summary order to the District Court, but in my judgment because of the separate stipulations relating to public nuisances contained in the Criminal Procedure Code and the procedural provisions governing such nuisances therein, they cannot be made to apply to nuisances specified in section 104(1) of the Kuching Municipal Ordinance. In this connection, section 3 of the Criminal Procedure Code is, in my view, of no assistance. As earlier indicated the point to consider is, on the basis that the proceedings before the lower court were proceedings brought under section 104(12) of the Kuching Municipal Ordinance, what was the nature of these proceedings. In my view, that subsection is a penalty subsection making failure to comply with the provisions of a nuisance order with respect to the abatement of a nuisance an offence, and prescribing thereof a sentence of a fine of $10/- a day during default in complying with the Nuisance Order. The fact that the same subsection contains provision relating to an acceptable defence does not in my judgment convert what is essentially a penalty subsection into one that is of a different nature. In my view, in proceedings brought under section 104(12) of the Kuching Municipal Ordinance, a charge should be framed against person proceeded against there-

under charging him with the offence prescribed therein and if he satisfies the court that he had used all due diligence to carry out the requirements of the nuisance order he should be acquitted of the offence charged; otherwise he should be found guilty of the offence of having failed to comply with the provisions of the relevant nuisance order with respect to the abatement of the nuisance concerned. I would add that, as already pointed out, a criminal summons referring to a charge, was issued and served upon the Respondent, but no copy of such charge can be found in the record of proceedings of the lower court. Solely on this ground, I consider the appeal is misconceived and the proceedings before the lower court were also legally wrong. I therefore set aside such proceedings before the lower court and order that, if the Appellant is still minded to proceed against the Respondent under section 104(12) of the Kuching Municipal Ordinance, the proceedings should be instituted on the basis of this judgment.

This is sufficient to dispose of the appeal which is dismissed for the reason already given. I am, however, asked by learned counsel for the Appellant to give guidance in relation to the making of an application for a nuisance order under section 104(4) of the Kuching Municipal Ordinance. In my view, it would have been of assistance if the legislature had set out procedural provisions in this respect, in the Ordinance, but in their absence, I shall endeavour to accede to learned counsel's request. In my view, what is a "summary" order" under section 104(4) of the Ordinance falls to be considered. In *Jowitt's* Dictionary of English Law (2nd Edition) Page 1719, the meaning of the word "Summary" is given as "an abridgment, a brief compendium; a summary application is one made to a court or judge without the formality of a full proceedings. In procedure, proceedings are said to be summary when they are short and simple in comparison with regular proceedings, that is, in comparison with the proceedings which alone would have been applicable, either in the same or analogous cases, if summary proceedings had not been available. . . . . ". The term "Summary" "is in law used as reference to a mode of dealing with certain matters expeditiously and without ordinary incidental formalities (see *Oxford Dictionary*)": *Dowson* v. *McGrath*[1], per Dwyer, C.J. at page 32.

It should be noted that, by making an application under section 104(4) of the Kuching Municipal Ordinance the applicant is in effect applying to the court for the exercise of a discretionary power to make a summary order. I would express the view that such an application should be given a certain degree of formality and application by letter hardly fulfils this criteria. I consider that it is not beyond the capabilities of the court and the Appellant to devise an acceptable mode of application. In this connection I would direct a copy of this judgment be served upon the Registrar of the High Court for her, in conjunction with the magistrates concerned and the Kuching Municipal Council, to work out such mode of application which would then apply generally.

Having regard to the authorities and the relevant provisions of the Kuching Municipal Ordinance, I am of the further view that the lower court which proceeded on the basis that proceedings relating to the making of a non-summary order should be adopted would appear to be unjustified. To hold otherwise would, in my opinion, mean that the object and intention of the legislature that the nature of the order is that it should be a "summary" one are not given effect to. Further, there is no question of the order made under section 104(4) being rendered "conditional" or "absolute". It need hardly be emphasized that it is up to the court to which a nuisance order is applied for to either make the nuisance order or to refuse it, since it is clear that the powers conferred by that section is a discretionary one. I end with the hope that what I have stated on the procedural aspects of the matter would be of some assistance.

Order accordingly.

Solicitors: *Reddy & Co.; Lo Ming & Co.*

LOW GEOK YEOK v. PUBLIC PROSECUTOR

[A.Cr.J. (Gunn Chit Tuan J.) November 12, 1981]

[Penang – Criminal Appeal No. 78 of 1980]

Dangerous Drugs – Dangerous drug manufacturing – Failure of prosecution to prove custody or control of drug or that accused had manufactured drug – Accused given benefit of doubt – Dangerous Drugs Ordinance 1952, s. 39 B(1) (a) & 39 B(2).

Criminal Law & Procedure – Dangerous drug manufacturing – Whether the appellant had manufactured chandu found on the premises – No proof of custody or control of drug – Accused given benefit of doubt.

The accused appealed against the conviction and sentence of the Sessions Court. He was charged for trafficking in dangerous drugs (manufacturing) of 56 gm. raw opium and 3.5 gm. chandu dross under section 39B (1)(a) of the Dangerous Drugs Ordinance 1952.